IN THE SUPREME COURT OF MISSOURI
EN BANC

ROBERT KAPLAN, et al.,	)	
	)	
Plaintiffs/Respondents	)	
	)	
vs.,	)	No. 85341
	)	
U.S. BANK, N.A., et al.,	)	
	)	
Defendants/Appellants	)	

Appeal from the Circuit Court
Of St. Charles County

The Honorable Ronald McKenzie
Senior Circuit Judge

Substitute Reply Brief Of Appellant U.S. Bank, N.A.

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Argument

Plaintiffs' brief is largely a diatribe against U.S. Bank (the Bank) and its lead trial counsel, Harry Wilson, whom the brief repeatedly accuses of lying to the Court. While the Bank attributes those allegations to counsel's desperation, rather than malice, the fact remains that those allegations are totally untrue. It is a serious matter to accuse a fellow lawyer of lying to a court, and responsible advocates reserve those charges for the rare case in which they have merit.

I. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Agency And Trespass Theories, Because Plaintiffs Did Not Have A Submissible Case Of Agency In That The Contract Did Not Give The Bank The Right To Control The Physical Conduct Of Southern.

The legal test of agency is whether the Bank had the right to control the **physical conduct** of Southern in executing the contract – i.e., the right to control the manner and means of completing the work. The right to demand proper performance of the contract does not, as a matter of law, satisfy that test. The Gusdorf/Southern contract unambiguously provided that the Bank did not have control over the manner and means of the work.

Plaintiffs claim that the Bank's reliance on that contract is "disingenuous," and an "artifice to avoid liability," because the Bank argued in pretrial proceedings that it was not a party to the contract. Br. at 62-63. Intentionally or not, plaintiffs have confused two very different issues:

1. Whether it was proper to pierce Gusdorf's corporate veil, so the Bank would be obligated by the contract? In pretrial proceedings, the Bank argued – accurately – that it was not a party to the contract and that it was

not using Gusdorf's corporate shell to commit fraud. App. Second Supp. L.F. 7-8. There is nothing remotely improper about such an argument. At trial, the Bank made a tactical decision to abandon that defense; there is nothing improper about that either.

2. Assuming the Bank was obligated under the contract, whether Southern was its agent? There is nothing improper about an owner structuring its affairs to limit its liability for an independent contractor's actions.

Plaintiffs also claim that Exhibit B to the contract gave the owner "direction and control of the daily work." Br. at 64. Exhibit B dealt with site reclamation, not disposal of concrete. More fundamentally, the rights discussed, such as the right to approve methods of compaction, do not give the owner control of Southern's **physical conduct**. Those rights are merely the right to insist on proper performance of the contract; as a matter of law, those rights are "insufficient in itself to justify the imposition of such liability." Halmick v. SBC Corporate Services, Inc., 832 S.W.2d 925, 929 (Mo. App. 1992).

Plaintiffs claim that the parties' characterization of their relationship is not controlling, even if set forth in a written contract. They also claim that they have the right to present evidence contradicting the contract. Br. at 64-66. These arguments fail to distinguish between the right of control and the exercise of control.

If the master actually exercises control over the means and manner of doing the work, an agency relationship may exist, even if an ambiguous contract "might be construed" otherwise. Baker v. Scott County Milling Co., 20 S.W.2d 494, 498 (Mo.

1929). In Baker, there was evidence "as to the directions given and apparent control exercised by defendant's president and superintendent." 20 S.W.2d at 499. That evidence, combined with the agent's "total[] inexperience[]," lack of "appliances with which to do the work," and financial irresponsibility, created a question of fact for the jury. Id. at 498-99.

In the instant case, there is no evidence of actual control. There is no evidence that Mercantile directed Southern how to dispose of the concrete. Southern was an experienced demolition and environmental contractor, Tr. 1677-81; it agreed to supply all "labor, materials, equipment and facilities" necessary to complete the work, Tr. 1692; and it agreed to provide a minimum of $2,000,000 in liability insurance. P.Ex. 137 Appx F.

When the issue is the right to control, the terms of an unambiguous contract control the outcome. In Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354 (Mo. 1954), this Court followed the contract and distinguished Baker on the ground that the plaintiff there had evidence of "control actually asserted." 265 S.W.2d at 360.

Plaintiffs' discussion of Williamson is, to quote their brief, "particularly disingenuous":

- The Williamson contract was "legitimate," whereas the Gusdorf/Southern contract was "an artifice" to shield the Bank from liability. Br. at 67. The whole purpose of independent contractors is to serve the owner's legitimate interest in avoiding liability. By this "logic," every independent contractor relationship is an "artifice."

- The Williamson contract "described the contractor's duties in sufficient detail" that no oversight was necessary. Br. at 67-68. The idea that the greater the putative principal's control, the less likely the finding of agency, is exactly backwards.
- The injury in Williamson did not arise from danger inherent in the contracted work. Br. at 68. That part of the Williamson opinion was discussing whether the telephone company owed a non-delegable duty to plaintiff, not whether the tree trimmer was an independent contractor. 265 S.W.2d at 358.

Plaintiffs attempt to distinguish Trinity Lutheran Church v. Lipps, 68 S.W.3d 552 (Mo. App. 2001), on the ground that the alleged master "contracted away its right of control." Br. at 68-69. It is hard to imagine how the Bank could more clearly have "contracted away" any right of control than to agree that Southern would be "solely responsible" for the work, as well as the proper disposition of all construction materials.

Plaintiffs claim that the Bank had the right to determine whether the concrete should be removed and where to place it. Br. at 69-70. The telephone company in Williamson had the right to designate what trees were to be cut and where the brush was to be taken. Since that is not the right to control the contractor's physical conduct, it is insufficient to make an agency case.

Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. App. 2002), is not to the contrary. The issue in Scott was whether a radiologist was an employee of the hospital. The cases on which Scott relied recognize that "application of hornbook rules of agency

to the hospital-physician relationship usually leads to unrealistic and unsatisfactory results," thus generating "a substantial body of special law" unique to hospitals. Keller v. Missouri Baptist Hosp., 800 S.W.2d 35, 37 (Mo. App. 1990) (citations and internal punctuation omitted). In that context:

> Liability premised on the theory of respondeat superior does not require plaintiff to prove that the employer had actual control over its employee's discretionary judgment as long as the employee's conduct is within the course and scope of employment.

Id. (citations and internal punctuation omitted). Normal agency law does require that the principal have the right to control the agent's physical conduct.

In any event, the basis for the Scott holding was circumstantial evidence: the hospital dictated the radiologist's fees and supplied all working space, support personnel and equipment, and the chief radiologist testified that they all regarded themselves as hospital employees. 70 S.W.3d at 567-68. There is nothing remotely like that degree of control in this record.

Plaintiffs claim that the right to control need only be commensurate with the supervision required of relatively unskilled trades. They cite several cases for the proposition that Southern's supervision of the loading, driving and dumping of the concrete does not make it an independent contractor. Br. at 70-71.

Plaintiffs may be correct that driving a dump truck is not a skilled trade. Selecting the proper site to dispose of PCB-contaminated concrete requires compliance with

extensive federal, state and local regulations. Tr. 1576; 1978; 2448-49; 2528. That clearly does require skill.

Moreover, the basis for each of plaintiffs' cases was that the employer actually controlled the actions of the employee. Carter v. Wright, 949 S.W.2d 157, 161 (Mo. App. 1997) (employer "wanted to retain control over the work done for him," and "exercised as much control as he could, short of actually riding in the truck"); Muckenthaler v. Ehinger, 409 S.W.2d 625, 627 (Mo. 1966) ("physical work and conduct of the truck drivers . . . were commanded, managed, directed and controlled" by employer); Pratt v. Reed & Brown Hauling Co., 361 S.W.2d 57, 63 (Mo. App. 1962) ("[a]ctual physical control over claimant's work was exercised" by employer). Plaintiffs point to no evidence that the Bank in fact controlled the details of Southern's work for the excellent reason that none exists.

The contract in the instant case says that Southern "shall be solely responsible" for the "means" of the work, and that all demolition materials "shall be . . . properly disposed of by Southern." P.Ex. 171 at 4. That is totally inconsistent with plaintiff's agency theory.

Plaintiffs' final salvo is § 220(2) of the Restatement (Second) of Agency. Br. 66-69. When an unambiguous contract determines the right to control, Missouri courts do not rely on the circumstantial evidence set forth in the Restatement. They rely on the four corners of the contract. Hougland v. Pulitzer Publ. Co., 939 S.W.2d 31, 33 (Mo. App. 1997).

Properly applied to the record in this case, the Restatement factors establish that plaintiffs had no submissible case of agency:

- The "extent of control" which the alleged master exercises "over the **details** of the work" (emphasis added). The Bank had no control over the details of Southern's work and the right to require Southern to deposit construction materials in a landfill is merely the right to require proper performance of the contract.
- Whether Southern engaged in "a distinct occupation or business." The Bank is in the banking business, including the sale of foreclosed collateral. As head of Special Assets, Ms. Myers had prior experience with such sales, but she had no experience with environmental issues. Tr. 968-69. Southern's business was demolition and environmental contracting. Tr. 1681. Whether or not that business is "specialized," it is certainly distinct from banking.
- The local custom on whether "the work is usually done under the direction of the employer or by a specialist without supervision." Plaintiffs point to no evidence that banks customarily direct disposition of waste generated by an environmental cleanup and the proposition is not intuitively obvious. The Bank hired Southern as a consultant, not as an employee. Tr. 1681.

- The "skill required in the particular occupation." As previously explained, selecting a site to dispose of concrete with some contamination of PCBs requires substantial skill and sophistication.
- Who supplies "instrumentalities, tools and the place of work." Plaintiffs concede that Southern supplied the trucks to haul away the concrete. Br. at 74. It is not true that the Bank supplied the "place of work" at which the concrete was disposed. The Bank had no control over plaintiffs' property or that of the Faye Avenue homeowners, and did not even know the concrete was being disposed of there. Tr. 1696.
- The "length of time for which the person is employed." Southern was employed as a consultant full time between late 1993 and late 1996. Tr. 1681. The reason was that it took four years to complete this complicated environmental cleanup, so this factor proves nothing.
- Whether the putative agent is paid by "time or by the job." Plaintiffs admit that, on this project, the Bank paid by the job, so this factor favors a finding of independent contractor. Br. at 74. What the Bank did on other jobs is irrelevant.
- Whether the work is "part of the regular business of the employer." As noted, the business of banking includes foreclosure and sale of property, not disposition of contaminated concrete. Nothing in the record suggests otherwise.

- Whether the Bank believed it was "creating the relation of master and servant." In their brief in the court of appeals, plaintiffs acknowledged that the Bank had no such belief. Ct. App. Br. at 68. They now claim it "perpetrated a four-year fiction" that Southern was working for Gusdorf, from which they claim the Court can infer the Bank thought Southern was its agent. Br. at 75. The Bank never denied that it exercised control over Gusdorf. App. Second Supp. L.F. at 7 n.1. By this "logic," any party who denies that the corporate veil should be pierced is automatically admitting liability on the underlying contract if it is pierced.[1]
- Whether Southern thought it was an agent. The only such evidence is Southern's self-serving claim after plaintiffs demanded that it remove the concrete. P.Ex. 216. The Bank promptly disclaimed Southern's alleged agency, P.Ex. 218, and Southern never again claimed that status.
- Whether "the principal is or is not in business." It is certainly true that the Bank was in the business of banking which, as noted, has little to do with the disposition of waste concrete. Of course, Southern was also in business in 1996, which suggests it was not an agent.

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[1] The Carter case on which plaintiffs rely, Br. at 74-75, is totally irrelevant. There, the principal asked the agent to lie about the identity of his employer. There is no evidence that the Bank asked anyone to lie about anything. It merely asserted a legal defense.

Thus, the only factors that even arguably support a finding of agency are the length of the engagement and the Bank's status as a business entity. The other factors strongly support a finding of no agency.

The fundamental flaw in plaintiffs' case is the failure to distinguish between the right to require proper performance of the contract and the right to control the means and manner by which the contract was performed. Only the latter supports a finding of agency. The Gusdorf-Southern contract unambiguously disclaims any control over the means and manner by which Southern performed its duties.

II. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Negligence Theory, Because Plaintiffs Did Not Have A Submissible Case Of Negligence In That The Bank Owed No Duty To Plaintiffs To Follow The Work Plan.

Plaintiffs did not have a submissible case of negligence, because the Bank owed them no duty to follow the Work Plan. They were not parties to the Work Plan. Since they were neither known to nor readily identifiable by the Bank when it executed the Work Plan, imposing a duty would lead to unlimited liability. Suits by third parties on work plans would deprive the parties thereto of the flexibility needed to respond to changing conditions.

Plaintiffs hardly even try to respond. They do suggest that the exceptions have swallowed the rule requiring privity. Br. at 76, quoting Westerhold v. Carroll, 419 S.W.2d 73, 77 (Mo. 1967). In fact, Westerhold plainly states that "any extension of the

limits of liability in this field should be done on a case-by-case basis, with a careful definition of the limits of liability." Id. at 77-78. L.A.C. v. Ward Parkway Shopping Center Co., 75 S.W.2d 247, 262 (Mo. banc 2002), recognizes that a contract "generally" does not create tort duties to third parties.

Plaintiffs assert that there is no excessive or unlimited liability if the "potential class of plaintiffs is easily identifiable." Br. at 77. They identify the relevant class of plaintiffs as "[t]hird party repositories of the contaminate material." Br. at 78. Since concrete with this low a level of contamination did not need to go into a landfill, Southern could put it anywhere on earth in full compliance with the environmental laws. Thus, plaintiffs' class consists of every property owner on the face of the earth – hardly the **limited** class of strangers to a transaction whom this Court has allowed to sue for its negligent performance.

Plaintiffs' sole authority on this issue, L.A.C., does not support their argument. As the Bank explained in its opening brief, the real basis for L.A.C. was that the security company voluntarily assumed a duty of reasonable care to ensure plaintiff's safety. Plaintiffs do not respond.

For that matter, there is no principled way to distinguish plaintiffs' claims from those of anyone else on earth who encountered the concrete. Plaintiffs assert that this result "does not necessarily follow," Br. at 79, but they do not explain why. Each of their arguments about the Bank's liability to them, Br. at 80, is just as applicable to the claims of the rest of humanity. The only reliable way to avoid unlimited liability is to limit the class of plaintiffs who can sue for negligent performance of a contract.

Plaintiffs also claim that the purpose of the work plan was to prevent illegal disposal of waste. Br. at 78. Because the PCBs were less than 10 ppm, there was no legal requirement to put the concrete in a landfill. Thus, it would have been perfectly legal for the Bank to have amended the Work Plan to delete the requirement for disposing of the concrete in a landfill.

Plaintiffs do not dispute that the Bank could have so amended the Work Plan. They ask what relevance this has to the Bank's liability for dumping concrete on an unwilling recipient. Br. at 79. It is certainly true that such an amendment would not affect Southern's liability for its trespass. But it would eliminate plaintiffs' direct negligence claim against the Bank, because the dumping would not violate the Work Plan. Plaintiffs can avoid that result only by arguing that the Bank could never amend the Work Plan, which is precisely the sort of burden on the contracting parties that the general rule seeks to avoid.

This case clearly implicates both of the policy reasons for refusing to allow strangers to a transaction to sue for its negligent performance: unlimited liability and undue burden on the parties to the contract. Notably, plaintiffs do not even attempt to defend the court of appeals' holding that foreseeability of injury is sufficient to create a duty.

III. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Claim For Punitive Damages, Because Plaintiffs Did Not Have A Submissible Punitive Damage Case.

The introduction to the Banks' Point III established that punitive damages are a harsh and extraordinary remedy, rarely applied, and then only when defendant's conduct is tantamount to actual wrongdoing. Plaintiffs are nowhere close to that demanding standard.

A. As A Matter Of Law, A Court Cannot Punish A Party For Exercising Its Constitutional Right To Take A Case To Trial.

The theme of plaintiffs' closing argument was that punitive damages were necessary because the Bank had not admitted that Southern was its agent or that the Bank was responsible for removing the concrete. But the trial court refused to direct a verdict for plaintiffs on the agency issue, thus establishing that – at least – there were triable issues of fact on that issue. In effect, plaintiffs told the jury to punish the Bank for exercising its constitutional right to a trial – a result that this Court has held is improper.

Plaintiffs do not respond to that argument. Instead, they argue that Mr. Wilson and the Bank asserted "a legal position that [they] knew was false" – to wit, that Gusdorf, rather than the Bank, had hired Southern and assumed responsibility for the cleanup. Br. at 81-82. There are two basic problems with this theory.

First, it is legally irrelevant because it has nothing to do with plaintiffs' substantive theories of liability. Plaintiffs submitted on trespass, negligence, and respondeat superior,

not on the nonexistent tort of malicious defense. Under Vaughn v. North Am. Sys., Inc., 869 S.W.2d 757 (Mo. banc 1994), they cannot recover punitive damages for conduct not proven to have caused them actual damages:

> The law has always required that a plaintiff's damages must be the direct result of the wrongful acts alleged. Otherwise, a plaintiff could rove through all of a defendant's conduct that might justify punishment, but that caused plaintiff no injury. If this were the case, our system of tort law would be chaos. This requirement is the same whether the damages sought are compensatory or exemplary.

869 S.W.2d at 759. Due process requires no less. State Farm Mut. Ins. Co. v. Campbell, ___ U.S. ___, 155 L.Ed.2d 585, 604 (2003) ("acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages").

Second, the statements about which plaintiff complain are true. The parties to the remediation agreement were Cooper, Wagner and Gusdorf; the Bank was merely a third-party beneficiary. P.Ex. 69. The parties to the demolition contract were Southern and Gusdorf, not the Bank. P.Ex. 137. In telling DNR that Gusdorf, rather than the Bank, had engaged Southern, Mr. Wilson told the exact and literal truth. P.Ex. 263; 335.

To be sure, the Bank had complete control of Gusdorf, and it never suggested otherwise. But complete control of a corporation, standing alone, is insufficient to pierce the corporate veil. There must also be proof that defendant used that control "to commit fraud or wrong" or some "dishonest and unjust act." Collet v. American Nat'l Stores,

Inc., 708 S.W.2d 273, 284 (Mo. App. 1986). The Bank had a perfect legal right to defend the case on the basis that it did not stand in Gusdorf's shoes.

Plaintiffs claim that this alleged "four-year history of misrepresentations" warrants punitive damages, because it proves that the Bank was "willing to say anything to avoid liability." Br. at 83. The Bank was willing to say anything truthful to avoid liability – i.e., to defend the case aggressively. That is precisely what Alcorn v. Union Pac. R.R., 50 S.W.3d 226, 248 (Mo. banc 2001), holds does **not** warrant punitive damages. In arguing that it does, plaintiffs have confessed error.

B. There Is Substantial And Uncontradicted Evidence That Both Southern And The Bank Offered To Remove The Concrete From Plaintiffs' Property.

Both Southern and the Bank promptly and repeatedly offered to remove the concrete from plaintiffs' property. As a matter of law, those offers – even if inadequate – establish that neither defendant recklessly disregarded plaintiffs' rights and hence neither can be liable for punitive damages.

Plaintiffs do not dispute the law: even inept efforts to rectify a continuing trespass preclude the imposition of punitive damages. Shady Valley Park & Pool v. Fred Weber, Inc., 913 S.W.2d 28, 37 (Mo. App. 1995). They resort to evasions and, in some cases, outright distortions of the record.

It is uncontested that Southern offered to pay for testing and to remove any contaminated materials at the very first meeting with plaintiffs in January 1997, but Mr.

Kaplan refused to allow it. Plaintiffs claim that this offer was inadequate because it was conditioned on a finding of contamination. Br. at 84. Under Shady Valley, however, even an inadequate attempt to correct a trespass defeats punitive damages. It is uncontested that Southern did contract with ATC to test the concrete, Tr. 1667; it did obtain bids for removal, Tr. 1699; and it did renew its offer to remove the concrete when the tests came back positive. Tr. 1758-59; 221.[2]

Plaintiffs claim that Southern never intended to assume responsibility for removing the concrete. Br. at 86. The only evidence they point to is that Southern was unable to obtain release forms from the homeowners and did not in fact pay for removal. Br. at 88-89. There is no evidence why Southern was unable to proceed, let alone any evidence of bad faith.

Plaintiffs characterize as "a lie" Southern's assertion that the concrete had been tested and was clean. Br. at 86. That assertion may have been in error, but there is no evidence that either Southern or the Bank consciously knew that at the time. For environmental purposes, it was clean. Tr. 2510-11; 2528.

Plaintiffs also quibble with the Bank's statement that they largely ignored the Bank before June 1997. They claim that the Bank "received and sent letters" and "was invited to meetings." Br. at 86. They also claim that, on February 6, 1997, they demanded that the Bank pay for testing. Br. at 87.

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[2] The record does not support plaintiffs' argument, Br. at 88, that Southern never paid this bill. The record shows only that Mr. Winter was "not sure" if it had. Tr. 1761.

Plaintiffs did write to Southern on that date demanding that **Southern** pay for testing; Ms. Myers was copied on that letter. P.Ex. 207. The letter does not demand that the Bank do anything, and Mr. Kaplan testified that it is not his normal practice to make demand on someone by sending a carbon copy of a letter addressed to someone else. Tr. 2309. He also testified that he knew of no written demand on the Bank prior to June 12, 1997. Tr. 2220.

Plaintiffs assert that the Bank wanted nothing to do with testing and refused to contribute a penny **to Southern** to that end. Br. at 87-88. The reason the concrete ended up on plaintiffs' property was because Southern put it there. It was hardly unreasonable for the Bank, in negotiating with Southern, to insist that Southern accept responsibility for the consequences of its actions.

In July 1997, when plaintiffs did demand that the Bank do something about the concrete, the Bank promptly agreed to remove it. Since their own exhibit clearly proves that the Bank "would have the material removed," P.Ex. 245, plaintiffs resort to evasions:

- The Bank did not call either of the lawyers involved or the scrivener of the note. Br. at 90. Since the note was clear on its face, the Bank saw no need to extend an already lengthy trial to explain it. If plaintiffs thought that the context needed explanation, they could certainly have called their employee who wrote the note or their lawyer who was on the call.
- Ms. Myers did not know of the offer. Br. at 90. That is hardly surprising, since she went into the hospital on June 15 with preterm labor and did not return to work until November. Tr. 1314.

- Mr. Winter testified that, as of June 1997, the Bank refused to give money **to Southern** to clean up the concrete. Br. at 90-91. What relevance that has to the Bank's offer **to plaintiffs** in July 1997 they do not explain.
- Shortly after the offer, the Bank "fired its environmental attorney" and hired that notorious litigation attorney Harry Wilson. Br. at 91. Of course, the first thing Mr. Wilson did was to reiterate the Bank's offer to "cause the concrete and other waste deposited" on plaintiffs' property "to be removed." Tr. 2261. Plaintiffs refused that offer because it did not accept "all of the terms" they had previously demanded. Id.

On this record, there can be no doubt: had plaintiffs wanted the concrete removed in the summer of 1997, the Bank would have done so. Mr. Kaplan preferred a lawsuit for punitive damages. Under Shady Valley, that evidence alone defeats the claim for punitive damages.

The Bank's opening brief also explained that both defendants unconditionally offered to pay for removal of the concrete the summer of 1999, and funded that offer with a $250,000 escrow. Plaintiffs assert that this proposal was "so deficient that it was criticized by its author for lack of a work plan and a sampling plan," and for "grossly understating the volume of concrete to be removed." Br. at 92. The witness actually testified that he would prepare a work plan and a sampling plan "after we had a paying project on the books," and send them in draft form to "attorneys, agencies, owners" for review and approval. Tr. 2413-14. He also testified that he would negotiate a change

order if the volume were underestimated. Tr. 2396. These criticisms address only the sufficiency of the offer, not defendants' good faith in making it.

Plaintiffs' only other argument is that the 1999 proposal was "litigation strategy" rather than a "serious offer," because the Bank "never intended . . . to remove the concrete." Br. at 92. This argument ignores the escrow. A quarter of a million dollars is unquestionably a serious offer. It is the farthest thing from the conscious disregard of plaintiffs' rights that is indispensable to a submissible case for punitive damages.

C. There Is No Evidence That Either Southern Or The Bank Knew That Their Conduct Created A High Probability Of Injury Or Of Complete Indifference To Or Conscious Disregard Of Plaintiffs' Rights.

Alcorn and Lopez v. Three Rivers Elec. Coop., 26 S.W.3d 151 (Mo. banc 2000), involved death or serious personal injury caused by repeated acts of negligence that had previously produced such consequences. In neither case did plaintiff have a submissible punitive damage case. The instant case involves the negligent failure to dispose of concrete in a landfill. No statute or regulation requires such disposal, and there was no threat to either public health and safety or the environment. If Alcorn and Lopez do not warrant punitive damages, the instant case cannot possibly do so.

This case satisfies none of the Lopez/Alcorn criteria. It is undisputed that neither the Bank nor Southern ever previously dumped contaminated concrete on someone's land without permission. Plaintiffs argue that, even without a prior incident, the Bank had

notice of the potential for injury. Br. at 102. This part of the criterion, however, looks to reprehensibility, not to knowledge:

> Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 577 (1996). Accord, Sutherland v. Elpower Corp., 923 F.2d 1285, 1291 (8th Cir. 1991) (cannot equate "knowledge of a characteristic found to be defective with complete indifference and conscious disregard"), cited with approval by Lopez, 24 S.W.3d at 160.

Even on its own terms, the record does not support this argument. Plaintiffs stubbornly refuse to acknowledge their own stipulation that this concrete was not hazardous waste or the uncontradicted testimony that all relevant regulatory authorities treat it as clean fill. There is no evidence that the 99 truckloads of concrete dumped on Mr. Winter's farm or the 114 truckloads dumped on his friend's farm have caused any injury to either property. The Bank cannot know something that is not true.

The second Lopez/Alcorn criterion is whether the injury would have occurred without the negligence of someone else. It is perfectly obvious that if Mr. Werre had accurately communicated the location of the property line to Mr. Winter, or if Mr. Winter had independently verified its location, plaintiffs would not have been injured.

Plaintiffs hardly try to respond. Their argument that the Bank's alleged negligence was a but for cause of their injury, Br. at 103, hardly refutes the Bank's argument that the same is true for Mr. Winter and Mr. Werre. Their argument that the jury awarded

punitive damages because the Bank identified other persons responsible for the trespass, id., hardly refutes this Court's holding that this factor argues against an award of punitive damages.

Plaintiffs' principal argument focuses on the third Lopez/Alcorn criterion: whether the Bank knowingly violated a statute, regulation, or clear industry standard. To repeat, plaintiffs' legal theory was that Southern and the Bank negligently failed to deposit the concrete in a landfill. Plaintiffs' brief is long on rhetoric – the Bank had "contempt for the regulatory process." Br. at 99. But it is very short on substance. Plaintiffs identify no statute or regulation requiring such disposition, for the excellent reason that none exists. The environmental authorities treat concrete with trace amounts of PCBs as clean fill. Tr. 2510-11; 2528. There is no legal requirement to dispose of it in a landfill.

Plaintiffs' reference to DNR notices of violation directed to Southern, Br. at 100, is quite misleading. Those notices all related to the Clean Water Act; as the Bank explained in its opening brief, the violation has nothing to do with PCBs. Tr. 2010. Southern's Clean Water Act violations are completely irrelevant to plaintiffs' theory that the Bank violated some regulation by not putting the concrete in a PCB landfill.

The balance of this section of plaintiffs' brief argues that the Bank violated the Work Plan and knew or should have known that the concrete was contaminated. Br. at 97-100. This is completely irrelevant to the third Lopez/Alcorn factor. The work plan is neither a statute nor a regulation, and there is no evidence of industry custom requiring concrete with trace levels of PCBs to be disposed of in a landfill.

Plaintiffs do not dispute that, had the Bank amended the Work Plan, it would have owed plaintiffs no duty to so dispose of the concrete. They argue that the Bank still could not properly dump the concrete on their property without their permission. Br. at 97 n.5. It is certainly true than an amendment to the Work Plan would not insulate Southern from liability for its trespass. But it would entirely eliminate the only direct negligence claim submitted against the Bank, and with it any possibility of a negligence-based punitive damage award.

This remains that oddest of punitive damage claims: one that the Bank could entirely escape merely by amending a contract with a third party.

D. It Violates Due Process To Award Punitive Damages In The Absence Of Any Of The Gore/Campbell Reprehensibility Factors.

It is certainly true that the ultimate issue in Campbell was the size of the punitive damage award. In the course of explaining its decision, however, the United States Supreme Court clearly held that the absence of any of the Gore/Campbell reprehensibility factors rendered any such award constitutionally "suspect." 155 L.Ed.2d at 602. The phrase "constitutionally suspect" is shorthand for "unconstitutional." Weinstock v. Holden, 995 S.W.2d 408, 410 (Mo. banc 1999). Plaintiffs cannot possibly have a submissible case for punitive damages if such an award would violate due process.

1. Economic injury. Plaintiffs do not dispute that the only injury they sustained was purely economic. They argue that the dumping harmed the environment. Br. at 106-07. The only relevant injury, however, is the one that plaintiffs sustained:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

Campbell, 155 L.Ed.2d at 604.

Moreover, there is no evidence that PCBs are toxic at the trace levels involved in this case. Plaintiffs stipulated that the concrete was not hazardous waste; EPA and DNR treat it as clean fill; and the concrete was not "a hazard to the health or the environment." Tr. 2443. Plaintiffs' evidence that PCBs are "very toxic," Br. at 107, does not address the level at which they become so.

2. Health and safety. Plaintiffs' discussion of the health and safety effects of this concrete suffers from the same infirmity. The Bank did not want to foreclose until the property had been cleaned, because much of the site had contamination well in excess of the 10 ppm threshold for clean fill. Tr. 837-39. The record does not support plaintiffs' assertion, Br. at 110, that DNR thought the presence of PCBs at these trace levels threatened the environment. As noted, the testimony that PCBs are "very toxic" does not address the level at which they become toxic. The opinion of some people at DNR that the PCBs violated the Clean Water Act, Tr. 2540, does not mean they posed any threat to health and safety.

The balance of plaintiffs' argument on this issue is that the Bank wanted its property clean and other people probably would not want PCB contamination on their property. Br. at 109-10. That only proves economic injury. It does **not** establish any

threat to health or safety. There is **no** evidence that PCBs at these trace levels cause any adverse effect on health or safety.

3. Financial vulnerability/intentional misconduct. Plaintiffs do not dispute that Mr. Kaplan had the resources necessary to pay for cleanup and to prosecute his claim for actual damages. The argument that his wealth does not automatically preclude recovery of punitive damages, Br. at 111, is irrelevant; it is one factor cutting against such an award.

Plaintiffs also claim that neither the record nor common sense permits a finding that they were not vulnerable to the cost of cleanup. Br. at 111. The point is that they were considerably **less** vulnerable than a blue collar worker. Campbell and Gore both squarely hold that such **relative** invulnerability counsels against a punitive award. Cf. Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. App. 1971) (in assessing punitive damages, jury may consider "relative financial standing of the parties").

Plaintiffs also claim that the Bank had sufficient knowledge of environmental risks associated with disposition of the concrete that its conduct should be deemed intentional. Br. at 111. That argument is irrelevant, because that intent, assuming it existed, was not directed to plaintiffs.

This part of the Gore/Campbell standard derives from TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), where the underlying tort was slander of Alliance's title. The Court held that the punitive award was not excessive, given the potential harm "to its intended victim." 509 U.S. at 460. The concrete ended up on

plaintiffs' property only because Mr. Werre and Mr. Winter misunderstood the location of the property line. There is no way to characterize that error as intentional.

4. Repeated misconduct. Plaintiffs do not dispute that there is no evidence to satisfy this criterion.

5. False statements/affirmative misconduct. Plaintiffs claim that the Bank's alleged "extensive history of misconduct, trickery and deceit" was the "centerpiece" of much of their evidence. Br. at 112. But it had nothing to do with their substantive theories of liability: respondeat superior, trespass and negligent performance of a contract. L.F. 184; 186; 188; 190. Under Vaughn and Campbell, they cannot defend a punitive award on grounds not proven to have caused them actual damage.

In any event, this "extensive history" is nothing more than plaintiffs' roundup of the usual suspects:

- The "litany of lies" consists of truthful statements to the homeowners that the concrete was clean fill and truthful statements to DNR that Gusdorf, rather than the Bank, was the party on the contract.
- The Bank "refused to test or remove the concrete." It only put a quarter of a million dollars into escrow to fund an unconditional offer to clean up the property.
- The Bank "litigated issues it knew to be false" – i.e., it argued that control of Gusdorf alone did not warrant piercing the corporate veil absent proof of fraud.

The record does not come close to supporting plaintiffs' grandiose claims of misconduct.

IV. The Trial Court Erred In Denying The Bank's Motion To Remit The Punitive Award, Because The $7 Million Punitive Judgment Violates The Bank's Right To Due Process, In That The Degree Of Reprehensibility Is Minimal And The Award Greatly Exceeds Civil Or Criminal Penalties For Such Conduct.

If plaintiffs did have a submissible punitive damage claim, the $7,000,000 award is so excessive that it violates due process. The Bank has already explained why its conduct was in no way reprehensible. The other two Gore factors also dictate that the award is excessive.

First, the 11 to 1 ratio of punitive to actual damages is clearly excessive. Plaintiffs speculate that the possibility of PCBs leaching into the creek could cause harm to persons other than them. Br. at 116-17. They make no effort to quantify that speculation. The PCBs had not in fact leached into the water, Tr. 2451, and the accumulation at the creek bottom was equal to normal background levels. Tr. 2443.

Plaintiffs also claim that the injury was hard to detect, because the contamination was invisible. When Mr. Kaplan looked at the ditch, he had no difficulty perceiving the presence of the concrete. Tr. 2026-27. When, immediately thereafter, he learned that the concrete came from the Gusdorf site, he "thought we had a very serious problem" because he knew the Gusdorf site had PCB contamination. Tr. 2029. As just noted, this clean fill posed no threat to the rest of the environment.

Plaintiffs assert that the Bank is guilty of "outright hallucination" for suggesting that the injury was obvious. Br. at 118. The Bank has never suggested, and does not

believe, that Mr. Kaplan was hallucinating when he gazed upon the concrete, "couldn't believe" what he was seeing, Tr. 2027, and immediately concluded that he had a very serious PCB problem. It is hard to imagine anything more obvious than "5,900 tons of rubble in chunks that were sometimes the size of automobiles." Br. at 116.

The final Gore factor is the civil or criminal penalties for comparable misconduct, although Campbell substantially downplays its significance. 155 L.Ed.2d at 608. Plaintiffs do not dispute that the civil or criminal penalties for this sort of trespass are a tiny fraction of the $7 million punitive award against the Bank. They do suggest that the Bank was eligible for a maximum fine under the Clean Water Act of more than $12 million. Br. at 118-19.

Plaintiffs never submitted against the Bank based on the Clean Water Act. Under Vaughn and Campbell, they cannot defend the punitive award on the basis of alleged bad acts that do not support liability for actual damages.

More fundamentally, the speculative prospect that some court might assess the maximum fine under the Clean Water Act, regardless of the equities, does not satisfy Campbell. The "remote possibility of a criminal sanction does not automatically sustain a punitive damages award." 155 L.Ed.2d at 608. DNR never considered penalties against plaintiffs, Tr. 1981-82, and it is sheer speculation that DNR will obtain any sizeable penalty against the Bank.

As Campbell holds, when "compensatory damages are substantial," a punitive award "only equal to compensatory damages" can be the outer limit. 155 L.Ed.2d at 606.

Given the absence of any of the Gore/Campbell reprehensibility factors, the punitive damage award should at the very least be reduced to $650,000.

Conclusion

For these reasons, the Bank respectfully prays that the Court reverse the judgment against the Bank and remand with instructions to dismiss the petition against the Bank. Alternatively, the Bank respectfully prays that the Court reverse the punitive damage award or remit it to not more than $650,000.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 7,643 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 1997 SR-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on August 20, 2003.

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